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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 2006-249/H05138
<p>I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]</p> <p>on _____</p> <p>Signature _____</p> <p>Typed or printed name _____</p>		<p>Application Number 10/694,549</p> <p>Filed 10/27/2003</p> <p>First Named Inventor Birgit Burg</p> <p>Art Unit 1796</p> <p>Examiner Necholus Ogden, Jr.</p>

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

applicant/inventor.



Signature

assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)

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March 1, 2009

Date

Registration number if acting under 37 CFR 1.34 _____

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.
Submit multiple forms if more than one signature is required, see below*.

*Total of 1 forms are submitted

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer U.S. Patent and Trademark Office, U.S. Department of Commerce P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the United States Patent Application of : :

Applicants: Birgit Burg, Dieter Legel, : Examiner:
Gerhard Blasey, Berthold Schreck : Necholus Ogden, Jr.
and Peter Schmiedel :
Application No.: 10/694,549 :
Filing Date: October 27, 2003 : Art Unit: 1796

Title: DETERGENT SHAPED BODIES WITH VISCOELASTIC PHASE

Reasons for Request for Review

Applicants request review of the rejection of pending claims 1–25 that was made in the pending United States Patent Office Examiner's Action mailed December 2, 2008. The reasons the rejection should be withdrawn are set forth below.

The Rejection of Claims Under 35 U.S.C. Section 103 as being Unpatentable over United States Patent No. 6,548,473 to Thoen et al. Should be Withdrawn

A. Legal standard for determining whether Applicants' claims are obvious under 35 U.S.C. Section 103

The legal interpretation of Section 103 to be applied is set forth in the recent Supreme Court decision of *KSR International Co. v. Teleflex Inc. (KSR)*, 550 U.S. ___, 82 USPQ2d 1385 (2007). *KSR* cites *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17–18 [148 USPQ 459] (1966)) as setting out an objective analysis for applying Section 103. (82 USPQ2d at 1388).

Under § 103, the scope and content of the prior art are to be determined; the differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy.

(148 USPQ at 467).

B. Application of the *Graham v. John Deere Co.* factual standards

1. Determining the scope and content of the prior art

The Thoen et al. patent is directed to a detergent tablet comprising a compressed solid body portion having therein at least one mould in the compressed solid body portion. This disclosure is set forth more specifically in the Abstract, which reads as follows:

A detergent tablet comprising i) a compressed solid body portion having therein at least one mould in said compressed solid body portion; and ii) at least one non-compressed, non-encapsulating portion mounted in said at least one mould of said compressed solid body portion, having an area of B, said at least one non-compressed, non-encapsulating portion comprising at least one detergent active; wherein surface area of said detergent tablet, excluding area of said at least one mould, is A; and wherein further ratio of B to A is from about 1:50 to about 4:1, by area. (Abstract).

Accordingly, all of the non-compressed non-encapsulating portion of the Thoen et al. tablet is mounted in said at least one mould of said compressed body portion of the tablet.

The Thoen et al. patent further describes the structure of the detergent tablet at column 52, lines 47-54, which read as follows:

It is also envisaged that the compressed portion may be prepared having a plurality of moulds. The plurality of moulds are then filled with a non-compressed, non-encapsulating portion. It is also envisaged that each mould can be filled with a different non-compressed, non-encapsulating portion or alternatively, each mould can be filled with a plurality of different non-compressed, non-encapsulating portion.

2. Ascertaining the differences
between the prior art and the claims at issue

As noted above, the Thoen et al. tablet comprises at least one non-compressed, non-encapsulating portion delivered to at least one mould of said compressed solid body portion. In order to retain the non-compressed, non-encapsulating portion in the mould, a wall of the mould formed from the compressed portion of the tablet must extend along at least part of the circumference of the tablet.

Applicants' invention as claimed in claim 1 is to a detergent or cleaner shaped body in the form of a three-layer tablet. The three-layer tablet comprises a viscoelastic phase, said phase comprising, based on its weight, 60 to 85% by weight of one or more alkylbenzene-sulfonates,

having a storage modulus of between 40,000 and 800,000 Pa. The viscoelastic phase is present in the form of a layer placed between two tableted phases, each in the form of a layer so that the three layers of the tablet exist and are visible over the entire circumference of the tablet. Claims 2-22 are dependent upon claim 1 or upon a claim that is dependent ultimately upon claim 1, incorporate the limitations of claim 1 and set forth further limitations in the claimed detergent or cleaner shaped body. Claims 23-25 incorporate the limitations of claim 1 and further define the viscoelastic layer as constituting 0.1 to 0.6 times the total weight of the remaining layers.

The structure of Applicants' claimed tablet is analogous to an ice cream sandwich with upper and lower tableted cookie layers and a frozen layer of ice cream placed between the upper and lower layers. Applicants' claimed three-layer tablet, in which the middle layer exists and is entirely visible over the entire circumference of the tablet, can only be formed and sustained if the middle layer has structural integrity.

As noted above, the non-compressed, non-encapsulating layer disclosed in Thoen et al. is added to at least one mould. Because of its need for walls of the mould(s) extending along the circumference of the tablet to retain the portion, the Thoen et al. method cannot result in Applicants' claimed tablet in which the non-compressed, non-encapsulating layer exists and is visible over the entire circumference of the tablet. Furthermore, Thoen et al.'s use of mould(s) to hold the non-compressed, non-encapsulating portion discloses that this portion lacks structural strength. Instead, the structural strength is provided by the mould walls. A tablet produced by Thoen et al., with the non-compressed, non-encapsulating phase that is visible along the entire circumference, would resemble an ice cream sandwich with melted ice cream in the center.

For that reason, the Thoen et al. method can only be employed if the non-compressed, non-encapsulating portion is in at least one mould.

As acknowledged by the Examiner, Thoen et al. does not disclose the storage modulus range of the viscoelastic phase as claimed in Applicants' shaped body. Accordingly, the storage modulus of the viscoelastic phase cannot be equated with that of the non-compressed, non-encapsulating phase of Thoen et al.

Therefore, one skilled in the art cannot modify the Thoen et al. tablet to obtain Applicants' claimed tablet, which comprises three separate layers, so that each of said three layers of the tablet

exists and is visible over the entire circumference of the tablet. As set forth above, the Thoen et al. patent instructs one skilled in the art that the non-compressed, non-encapsulating layer is in moulds formed from the compressed portion of the tablet. In comparison, Applicants' claimed viscoelastic layer is structurally stable and therefore exists and is visible over the entire circumference of the tablet. For these reasons, Applicants' layer must also be different in composition from the non-compressed, non-encapsulating layer disclosed in the Thoen et al. patent.

In re Dillon is relied on by the Examiner to show that a *prima facie* case of obviousness was established because the art provided the motivation to make the claimed composition in the expectation that they would have similar properties. *In re Dillon* concerned the patentability of claims to a composition wherein the additives of the new compositions are structurally similar to additions in known compositions. *In re Dillon*, 16 USPQ2d 1897, 1900 (Fed. Cir. 1990). Unlike the compositions in *In re Dillon*, Applicants' claimed three-layer tablet is distinct in composition and structure from the tablet disclosed in Thoen et al.

3. Resolving level of ordinary skill in the pertinent art

The inventors of the present application and the inventors of United States Patent No. 6,548,473 to Jacques Kamiel Thoen et al. represent persons of ordinary skill in the art.

4. Possible utilization of secondary considerations

There has been a long felt need for a multi-layer tablet to permit the incorporation into the tablet of ingredients which are otherwise incompatible with one another.

C. Application of the KSR test demonstrates the unobviousness of Applicants' claimed tablet

The Supreme Court's analysis in *KSR* included a determination of obviousness based on the lack of improved results of a claimed combination over the elements in the combination. The Court cited *United States v. Adams*, 383 U.S. 39, 40 [148 USPQ 479] (1996) in determining that "the fact that the elements worked together in an unexpected and fruitful manner supported the conclusion that Adams's design was not obvious to those skilled in the art" (referring to *United States v. Adams*, 383 U.S. 39, 40 [148 USPQ 479] (1966) *Id.* 82 USPQ2d 1395). Applicants' claimed tablet comprises separate layers that work together in an unexpected and fruitful manner over the tablet

Request for Review of rejection made in
Final Office Action dated 12/02/2008

PATENT
Application No. 10/694,549
Filing Date: 10/27/2003
Examiner: Necholus Ogden, Jr.
Art Unit: 1796
Attorney Docket No. 2006-249/H05138

disclosed in Thoen et al. in that it is easier to assemble without the requirement in Thoen et al. that the non-compressed, non-encapsulating portion of a tablet must be confined in at least one mould.

D. Applicants' claimed tablet is not obvious

Accordingly, for the reasons set forth above on pages 2-4 relating to the application of the factual standards set forth in KSR, the rejection of claims 1-25 under 35 U.S.C. Section 103(a) as being unpatentable over United States Patent No. 6,548,473 to Thoen et al. is untenable and should be withdrawn.

Respectfully submitted,

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Date: March 1, 2009

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